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13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN FRANCISCO DIVISION

16 GREGORY WOCHOS, Individually and on
17 Behalf of All Others Similarly Situated,

18 Plaintiff,

19 v.

20 TESLA, INC., ELON R. MUSK, DEEPAK
21 AHUJA, and JASON WHEELER,

22 Defendants.

Case No.: 3:17-cv-05828-CRB

**DEFENDANTS' REPLY
MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS AMENDED
COMPLAINT**

Date: August 24, 2018
Time: 10:00 a.m.
Dept.: Courtroom 6, 17th Floor
Judge: Hon. Charles R. Breyer

Date Action Filed: October 10, 2017

FENWICK & WEST LLP
ATTORNEYS AT LAW
SAN FRANCISCO

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SUMMARY OF ARGUMENT

The Opposition is most notable for what it fails to do: (i) address Tesla’s *actual disclosures* on May 3 and August 2, 2017, which demonstrate that this entire case is based on a false narrative, (ii) provide any coherent response to the facts that eviscerate scienter, including Tesla’s blunt warnings about the challenges of Model 3 production, the absence of any financial or other benefit to defendants (which plaintiffs now concede), and the overwhelming facts demonstrating Tesla’s good faith, and (iii) identify the detailed, pleaded facts required to show loss causation.

No Falsity. Plaintiffs’ main argument is that, by stating on May 3 and August 2, 2017 that Tesla’s “preparations” were “on track to support the ramp” of Model 3 production to 5,000 vehicles per week by the end of 2017, Tesla “led investors to believe that Tesla’s automated production line had [been] built.” Opp. at 8. That is a complete fiction. Tesla not only did not “imply” that its automated production lines had been built, it repeatedly stated the *opposite* in plain, unambiguous terms. In May, two months before Model 3 production even began, Tesla said it had just “*started the installation* of Model 3 manufacturing equipment,” was “on track for initial production in July” (a target Tesla hit), would “increase automation and add production capacity” through the remainder of the year and “will need to complete building,” “equipping,” and “installing” production equipment and lines on its “projected timeline” to hit its year-end goal of producing up to 5,000 vehicles per week. Mot. at 3, 13-14. Likewise, in August, shortly after production began, Tesla clearly stated that it was “*continuing preparations* at our production facilities,” it “*will need to complete the implementation and ramp of efficient, automated . . . manufacturing capabilities, processes and supply chains necessary to support*” volume production “on our projected timeline,” and that to achieve its plans, it will need “*to add production lines and capacity as planned.*” *Id.* at 3, 17-18.

The Opposition *completely ignores Tesla’s disclosures*. Instead, in an effort to sweep aside Tesla’s actual words about the state of its automated manufacturing, plaintiffs point to Mr. Musk’s answer to an analyst’s question on August 2 concerning expected Model 3 gross margins (not production readiness), in which he made reference to a “gigantic machine” producing a few

1 hundred cars a week as an illustration to explain why margins would be negative for a while.
 2 According to plaintiffs, this passing reference somehow indicated that all automation was already
 3 in place. That is nonsense. Tesla expressly stated that it had **not** completed the installations, and
 4 Mr. Musk was merely making the point that margins would be negative until production ramps.
 5 Indeed, Tesla’s Model 3 manufacturing occurs on multiple lines across two factories in two
 6 states, not through a single “gigantic” machine spitting out cars. Moreover, on August 2, Tesla
 7 also disclosed that it expected to produce 1,500 cars **for the entire** 13-week third quarter (ending
 8 September 2017). Knowing that, no investor could believe that this illustrative example was a
 9 representation that Tesla was already producing a few hundred each week.

10 A securities fraud claim must be based on what a company actually disclosed to investors
 11 and is evaluated in context, including Tesla’s contemporaneous statements. *See Police Ret. Sys. v.*
 12 *Intuitive Surgical, Inc.*, 759 F.3d 1051, 1060 (9th Cir. 2014); *Brody v. Transitional Hosps. Corp.*,
 13 280 F.3d 997, 1006 (9th Cir. 2002). The disclosures dealing with the status of manufacturing
 14 readiness uniformly stated in express terms that Tesla’s work was ongoing and there was more to
 15 be done. No reasonable investor reading Tesla’s disclosures, including Mr. Musk’s gross margin
 16 illustration, would have concluded that Tesla claimed to have fully automated production in place
 17 on May 3 or August 2. *See id.* at 1006-07 (actual words did not convey alleged misimpression); *In*
 18 *re Rigel Pharms., Inc. Sec. Litig.*, 697 F.3d 869, 880-81 (9th Cir. 2012) (dismissing “on track”
 19 and other claims in light of disclosures); *Colyer v. Acelrx Pharms., Inc.*, 2015 WL 7566809, at *6
 20 (N.D. Cal. Nov. 25, 2015) (dismissing claims that were “not a reasonable interpretation of
 21 Defendants’ statements”); *In re Tesla Motors, Inc. Sec. Litig.*, 75 F. Supp. 3d 1034, 1043 (N.D.
 22 Cal. 2014) (disclosures negated plaintiffs’ ability to plausibly plead that a reader was misled),
 23 *aff’d*, 671 F. App’x 670 (9th Cir. 2016).

24 Plaintiffs’ Opposition is also premised on another underlying false assumption: that
 25 Model 3 production would not even commence unless and until full automation was in place. But
 26 full automation was not necessary for initial Model 3 production to begin. That Tesla was
 27 ultimately planning to install and utilize unprecedented manufacturing techniques, involving a
 28 high degree of automation, to ramp to an anticipated production rate of 5,000 **by year end**, does

1 not mean that no Model 3s would be built in the interim. Although plaintiffs pejoratively refer to
 2 vehicles “being banged out by hand,” there is nothing surprising or untoward about Tesla using
 3 some manual and semi-automated processes, particularly at the beginning of a production ramp.
 4 Tesla meant just what it said: Model 3 production began (in July, as it said it would), and
 5 preparations continued with the installation and implementation of highly automated
 6 manufacturing. Underscoring the point, at the July launch event, Mr. Musk displayed a
 7 manufacturing S-curve graphic showing that Tesla expected Model 3 production to be
 8 exceedingly modest in the short run, only ramping up in October 2017 (completely in line with
 9 the notion that more automation would come online around that time). Ex. 16 at 2. In other words,
 10 the Opposition’s oft-repeated assertion that cars or batteries were not produced on fully
 11 automated equipment until October is *perfectly consistent* with Tesla’s disclosures. *See Ronconi*
 12 *v. Larkin*, 253 F.3d 423, 434 (9th Cir. 2001).

13 Further, it is especially telling that, despite claiming that Tesla’s “preparations” were “not
 14 on track” as of May 3 and August 2, 2017, plaintiffs still identify *no facts* detailing the production
 15 plan, when various automated processes were scheduled to be fully implemented under that plan,
 16 and then how Tesla’s actual progress compared – much less any facts suggesting that any delays
 17 were so insurmountable that the year-end forecast could not be met. Mot. at 3, 14, 18. Plaintiffs
 18 never explain how a court could determine whether Tesla was “off track” without knowing what
 19 the track was. *See Rigel*, 697 F.3d at 881-82 (on track statement not actionable where plaintiffs
 20 failed to show that plans and expectations deviated from statement); *Xu v. ChinaCache Int’l*
 21 *Holdings, Ltd.*, 2017 WL 114401, at *6 (C.D. Cal. Jan. 9, 2017) (“Plaintiff does not allege a
 22 timeline against which the ‘on track’ claim might be verified. Accordingly, plaintiff does not
 23 allege that the migration ...was off-track”); *3226701 Canada, Inc. v. Qualcomm, Inc.*, 2017 WL
 24 4759021, at *18 (S.D. Cal. Oct. 20, 2017) (statement that company was unaware of any
 25 significant technical issue that would cause delay not actionable absent facts showing problem
 26 was known to be “insurmountable”); *City of Royal Oak Ret. Sys. v. Juniper Networks, Inc.*, 880 F.
 27 Supp. 2d 1045, 1064 (N.D. Cal. 2012) (plaintiffs failed to plead specific facts showing known
 28 problems necessarily precluded company from reaching projected growth rate); *Allison v.*

1 *Brooktree Corp.*, 999 F. Supp. 1342, 1348 (S.D. Cal. 1998) (problems introducing new product
2 are the norm, and notably absent were allegations that they were viewed as insurmountable by
3 management).

4 More devastating still, plaintiffs do not contest (because their own witnesses corroborate
5 it) that it was not until **September** – well after the challenged statements – that Tesla encountered
6 the unexpected problems with the Gigafactory’s module line, and that those were the problems
7 that proved to be the bottleneck on production. It goes without saying that fraud cannot be
8 committed in May or August by not disclosing problems that only arose for the first time one to
9 four months later, in September. Plaintiffs’ claim is simply fraud by hindsight.

10 **No Scierter.** Nor does the Opposition point to facts giving rise to any inference of
11 scierter, let alone a strong, cogent and compelling one. *See Tellabs, Inc. v. Makor Issues &*
12 *Rights, Ltd.*, 551 U.S. 308, 323 (2007); *Webb v. SolarCity Corp.*, 884 F.3d 844, 855 (9th Cir.
13 2018). To the contrary, given the absence of any stock trading or other benefit to defendants,
14 plaintiffs have now abandoned any suggestion that there was a “financial motive” to commit
15 fraud. Nor do plaintiffs have any answer to the blunt and specific warnings of the many
16 challenges associated with Model 3 production – detailed at length at pages 1-3 and 8-10 of
17 defendants’ motion – which also weigh heavily against scierter. *See Rigel*, 697 F.3d at 884
18 (disclosure of significant adverse event inconsistent with scierter); *In re Worlds of Wonder Sec.*
19 *Litig.*, 35 F.3d 1407, 1425 (9th Cir. 1994) (“detailed risk disclosure...negates an inference of
20 scierter”); *In re Wet Seal, Inc. Sec. Litig.*, 518 F. Supp. 2d 1148, 1152, 1164-65 (C.D. Cal. 2007)
21 (dismissing claims given contemporaneous cautionary disclosures).

22 Instead, plaintiffs lapse into generalities, parroting the superficial argument that Tesla’s
23 concrete warnings were mere “hypotheticals.” Yet plaintiffs point to nothing to support the notion
24 that some undisclosed “risk” had already materialized as of May 3 (months before production
25 started) or August 2 (just after it began); to the contrary, their own FEs corroborate that the
26 module line bottleneck did not occur until September. Nor do plaintiffs cite a single case holding
27 that disclosures like Tesla’s (that it was entering “production hell,” faced an “incredibly difficult
28 production ramp” and warned of “inevitable” and “unavoidable” problems) were merely

1 “hypothetical” or boilerplate. There is no such case for a good reason: no one deliberately trying
2 to paint an overly rosy view of Model 3 production would ever make such statements. Lacking
3 any case support or response, plaintiffs make the unprecedented claim that Tesla’s warnings were
4 pessimistic “puffery” (Opp. at 8) – a concept not recognized in law and wholly at odds with the
5 notion of securities fraud.

6 Ultimately, plaintiffs’ scienter argument boils down to the assertion that defendants “were
7 told, repeatedly, that their timeline for mass production was unachievable.” Opp. at xii. But
8 plaintiffs’ only support for that proposition is a single FE (FE1), a former “plastics” employee
9 fired by Tesla in June 2016, *over a year before production even began* (and 18 months before the
10 5,000 per week by end of 2017 target date). Beyond that, FE1 based his opinion on the incorrect
11 premise that Tesla would not *even start* production until January 2018 when, in fact, initial
12 production started on time in July 2017. The Opposition’s attempt to explain away that fatal flaw
13 – by claiming that FE1 meant “mass” production would not be underway until 2018 – flatly
14 misrepresents their own AC, which emphasized his assertion that production would not “*start*”
15 until six months after the July 2017 date. AC ¶ 128 (emphasis in original). But no matter how
16 much plaintiffs attempt to backtrack and rewrite FE1’s opinion back in June 2016, it is telling that
17 plaintiffs do not plead that any defendant agreed with his view. In any event, uniform like-
18 mindedness is not expected in a 37,000 employee company like Tesla and is not a requirement of
19 the securities laws. It is absurd to suggest that the outdated opinion of a single fired employee
20 based on an entirely false premise comes close to establishing a cogent and compelling inference
21 of scienter. If such a thin allegation were to meet that standard, a securities fraud case would be
22 adequately pled every time there is a single contrarian in a company of many thousands of people.
23 That standard is unworkable in practice and is not close to the law.

24 **No Loss Causation.** Plaintiffs abandon any pretense that Tesla’s October 2 disclosure of
25 Model 3 production bottlenecks (and the missed guidance for Q3) caused any loss, as Tesla’s
26 stock price actually *increased* after that disclosure. *See Metzler GmbH v. Corinthian Colls., Inc.*,
27 540 F.3d 1049, 1063 (9th Cir. 2008). Plaintiffs’ reliance on the October 6 *WSJ* story is also
28 misplaced. This was not a “corrective” disclosure by Tesla, but a hearsay article speculating that

1 the absence of complete automation (such as welding certain parts by hand) was behind the
 2 bottleneck. But again, Tesla *never said* that all automated systems were in place as of May 3 or
 3 August 2 (it said the opposite) so the *WSJ* did not “correct” any Tesla statement made months
 4 earlier. *See In re Intrexon Corp. Sec. Litig.*, 2017 WL 732952, at *7 (N.D. Cal. Feb. 24, 2017).
 5 Nor can the temporary one-day decline that followed establish loss causation. *See Metzler*, 540
 6 F.3d at 1065 (no loss causation because, within three days, “stock quickly recovered from the
 7 10% drop” following a *Financial Times* story). Finally, because plaintiffs have made no claim
 8 based on Tesla’s November 1, 2017 release of revised forward-looking guidance, they cannot
 9 establish loss causation based on that disclosure. Plaintiffs’ effort to avoid dismissal based on a
 10 November 2 mid-day website article fails, as plaintiffs have not and cannot plead that Tesla’s
 11 stock price declined following that posting, as opposed to earlier in the day in response to the
 12 guidance change. *See Or. Pub. Emp. Ret. Fund v. Apollo Grp., Inc.*, 774 F.3d 598, 605 (9th Cir.
 13 2014) (loss causation must be pleaded with specificity).

14 **No Leave to Amend.** Plaintiffs’ allegations are irreconcilable with Tesla’s disclosures
 15 about Model 3 production. They rest on a fraud theory that makes no sense, benefitted no one,
 16 and is contrary to overwhelming facts defeating scienter. Because repleading will not fix these
 17 ills, and plaintiffs have not even tried to identify further facts they could plead, leave to amend
 18 should be denied. *See Greenburg v. Sunrun, Inc.*, 233 F. Supp. 3d 764, 775 (N.D. Cal. 2017). In
 19 this respect, despite plaintiffs’ purported reliance on “post class period” events and “public
 20 information,” such events illustrate why leave to amend would be futile: Tesla has *reached* the
 21 Model 3 production milestone of 5,000 vehicles a week and, even before that, Model 3 had
 22 already become the best-selling electric vehicle in the United States and the best-selling mid-sized
 23 premium sedan of all kinds (outselling the Mercedes C class, BMW 3 Series, Audi A4 and Lexus
 24 IS, *combined*).

25 Tesla encountered a temporary speedbump at the very outset of a particularly complicated
 26 production ramp – one that Tesla warned it could face. That is not the basis for a securities fraud
 27 suit.
 28

1 **I. INTRODUCTION**

2 Defendants' motion detailed Tesla's disclosures of the many challenges it faced in seeking
3 to become the first automobile company to introduce a mass-market all-electric vehicle, including
4 the need to install, complete and ramp never-before-tried manufacturing systems incorporating an
5 extraordinary amount of automation, including at the new Gigafactory it had just built. Given the
6 enormity of the Model 3 undertaking and the lack of certainty around precisely how long it would
7 to take to ramp production, defendants provided an array of blunt, plain-English warnings about
8 the likely challenges Tesla would face.

9 The Opposition ignores these disclosures and pursues an irrational thesis that, despite
10 extensive detailed warnings and the lack of any financial benefit, defendants engaged in a short-
11 term "fraud" to mislead investors about Model 3. Once plaintiffs' evasions and errors are exposed
12 and disregarded (as they must be), there are no facts showing that any defendant made a false or
13 misleading statement, much less supporting a strong, cogent and compelling inference that
14 defendants intended to mislead anyone at any time.

15 **II. THE OPPOSITION SHOWS THAT PLAINTIFFS CANNOT ALLEGE A FALSE
OR MISLEADING STATEMENT**

16 **A. Plaintiffs' Arguments Regarding The May 3, 2017 Statements Ignore Tesla's
17 Disclosures And Instead Rest On Plaintiffs' False Narrative**

18 Plaintiffs avoid discussing Tesla's statements because they cannot be reconciled with the
19 false narrative on which they premise this case. Tesla's May 3 statements were made two months
20 before Model 3 production started. As defendants explained on this motion, Tesla said it had just
21 "*started the installation* of Model 3 manufacturing equipment," was "on track for the start of
22 ...production in July 2017" (a target it hit), "expected to make additional investments through the
23 remainder of the year to increase automation and add production capacity," and "will need to
24 complete building," "equipping," and "installing" production equipment and lines on its
25 "projected timeline" to hit its year-end goal. Mot. at 3, 14; Ex. 15 at 30-31, 40-43; Ex. 13 at 1.

26 Yet plaintiffs continue to *ignore* these disclosures entirely. Instead, they argue that by
27 saying "preparations at our production facilities are progressing to support the ramp of Model 3
28 production to 5,000 vehicles per week at some point in 2017," Tesla "led investors to believe that

1 Tesla’s automated production line had [been] built.” Opp. at 8; *see* AC ¶¶ 210, 212. A securities
 2 fraud claim must be based on what a company actually disclosed to investors (and the underlying
 3 statements must be evaluated in context). *See, e.g., Intuitive Surgical*, 759 F.3d at 1060. Here, it is
 4 obvious that no reasonable investor would have concluded that Tesla claimed to have fully
 5 automated production in place on May 3 since it said the opposite. *See Brody*, 280 F.3d at 1006;
 6 *Colyer*, 2015 WL 7566809, at *6. Indeed, the May 4 analyst report referenced in the AC (¶ 113)
 7 correctly noted that Tesla “has an exceptionally large volume of work to do in upcoming months”
 8 to reach its year-end target. *See* Ex. 30.

9 Moreover, the Opposition never identifies facts detailing the production plan as it stood on
 10 May 3, or when various automated processes were scheduled to be fully implemented under that
 11 plan, much less how Tesla’s actual progress fell short of that plan or rendered its year end goal
 12 insurmountable. Mot. at 14. One cannot claim that a company is so far behind its planned
 13 schedule that targets could not be met without knowing what the planned schedule was compared
 14 to the actual progress. Yet plaintiffs provide none of these facts, asserting that they are not
 15 required (Opp. at 9). That is simply incorrect. *See Xu*, 2017 WL 114401, at *6 (failure to allege
 16 actual timeline for comparison fatal); *Qualcomm*, 2017 WL 4759021, at *18 (problem must be
 17 viewed as “insurmountable” and would cause delay); *Juniper*, 880 F. Supp. 2d at 1064 (problems
 18 must necessarily preclude projected growth rate); *Allison*, 999 F. Supp. at 1348 (problem must be
 19 insurmountable).¹

20 Even putting aside that Tesla said the opposite of what plaintiffs claim, Tesla’s

21 ¹ Nor can plaintiffs dodge the need for such specifics by arguing that the pertinent “timeline” is
 22 the end of 2017 (when Tesla hoped to ramp to 5,000). Opp. at 10. That goal is not a
 23 **contemporaneous fact** showing Tesla was off-plan as of May 3. Plaintiffs’ argument also
 24 highlights that the assailed statement is forward-looking – concerning “preparations to support the
 25 ramp to 5,000 by year end” – and thus protected by the PSLRA safe harbor. *See Intuitive*
 26 *Surgical*, 759 F.3d at 1059; *Pompano Beach Police & Firefighters Ret. Sys. v. Las Vegas Sands*
 27 *Corp.*, 2018 WL 2015510, at *2 (9th Cir. May 1, 2018) (“on track” forward-looking); *see also*
 28 Mot. at 16. In any event, because plaintiffs cannot plead falsity, their claim fails **regardless** of
 whether or not the statement is deemed forward-looking. Mot. at 15-16 n.10. Finally, plaintiffs’
 assertion that defendants’ cases all involved financial goals (Opp. at 7 n.14), as opposed to
 production goals, is flatly wrong (and a meaningless distinction in any event). *See Qualcomm*,
 2017 WL 4759021, at *15-17 (on track for release and availability of new device); *Xu*, 2017 WL
 114401, at *6 (on track to migrating products to new platform); *In re Am. Apparel S’holder Litig.*,
 855 F. Supp. 2d 1043, 1072 (C.D. Cal. 2012) (on track to remediating internal control issues);
Callan v. Motricity, 2013 WL 5492957, at *6-7 (W.D. Wash. Oct. 1, 2013) (product contracts on
 track).

disclosures included an array of blunt warnings about the challenges and uncertainties of Model 3 production (Mot. at 1-4, 8-10). These warnings, which even called the difficult challenge ahead “production hell,” are fundamentally incompatible with some notion that Tesla was guaranteeing it would achieve its year-end goal. *See Am. Apparel*, 855 F. Supp. 2d at 1072-73 (“it is difficult to find deception in statements that the company was ‘on track’ to ‘making significant progress . . . by year-end’ since the comment can hardly be construed as a guarantee”); *Xu*, 2017 WL 114401, at *5 (“Where contemporaneous statements . . . qualify the alleged false statements, plaintiffs must allege why they remain misleading”). Regardless, there was no statement that even needed qualifying here since Tesla stated, point blank, that automation was not complete.

Plaintiffs’ citation to a pre-PSLRA case, *In re Apple Computer Sec. Litig.*, 886 F. 2d 1109 (9th Cir. 1989), without *any* analysis, completely backfires. In *Apple*, the court actually affirmed the dismissal of all claims relating to the Lisa computer because, while expressing optimism, the statements were made in the context of disclosed risks and uncertainties (*id.* at 1118-19), and Apple’s “massive investment in Lisa demonstrates this good faith” (*id.* at 1117). The same holds true here. As to Apple’s disk-drive product Twiggy, that claim was sustained *only* because plaintiffs identified *specific facts* showing defendants knew the product suffered from a profound design flaw, yet at the same time represented that it had “undergone extensive testing and design verification during the past year.” *Id.* at 1115-16. In other words, they offered what plaintiffs lack here: specific facts undermining defendants’ *actual statements*. By contrast, plaintiffs do not even address Tesla’s actual words. *See In re Convergent Tech. Sec. Litig.*, 948 F.2d 507, 515-16 (9th Cir. 1991) (addressing *Apple* and affirming dismissal of claims relating to breakthrough product in light of disclosed manufacturing risks); *Qualcomm*, 2017 WL 4759021, at *18.

Finally, plaintiffs assail Mr. Musk’s May 3 statement that Tesla had “a much better supply chain in place” and, “as far as we know there are no issues.” Mot. at 15; AC ¶ 214. However, plaintiffs offer nothing to suggest these statements were false (or that Mr. Musk did not hold that opinion). Indeed, plaintiffs do not even try to address what their own witness concedes: that the module line issues did not emerge until *September 2017* as Tesla sought to ramp production (AC ¶ 192), long after the May 3 statement. Instead, plaintiffs cite AC paragraphs about what three

1 *potential* suppliers of unspecified parts (out of thousands of suppliers for Model 3) supposedly
 2 said a year earlier in **June 2016** (AC ¶¶ 136, 138, 140) and other assertions that have nothing to
 3 do with the supply chain (AC ¶¶ 161, 179). Opp. at 7, 11. But the notion that some potential
 4 suppliers in 2016 found Tesla’s timetable challenging was no secret: Mr. Musk discussed it on the
 5 May 4, 2016 earnings call (Ex. 2 at 4, 7, 8, 11), and the August 3, 2016 earnings call (Ex. 5 at 8),
 6 and such risks were discussed in Tesla’s Form 10-Qs as well (Ex. 3 at 33, 35; Ex. 6 at 33, 35).
 7 *See also* Ex. 11 at 6, 9-10, 15.² Supposed concerns of potential suppliers back in 2016 have
 8 nothing to do with Tesla’s actual statements on May 3 and August 2, 2017.

9 **B. Plaintiffs’ Arguments Regarding The August 2, 2017 Statements Also Ignore**
 10 **Tesla’s Disclosures And Rest On Plaintiffs’ False Narrative**

11 Plaintiffs’ claim that Tesla’s August 2 “on track” statement meant that “the automated
 12 production line” was complete is equally false. Again, Tesla said precisely the opposite. It said it
 13 was “*continuing preparations* at our production facilities,” it “*will need to complete the*
 14 *implementation and ramp of efficient, automated ...manufacturing capabilities, processes and*
 15 *supply chains necessary to support*” volume production “on our projected timeline,” and that to
 16 achieve its plans, it will need “*to add production lines and capacity as planned.*” Mot. at 3, 18.
 17 Tesla also disclosed that it was still procuring equipment for Model 3 production. *Id.* at 18. These
 18 disclosures put the lie to plaintiffs’ false narrative that Tesla said that all automated production
 19 processes were complete as of August 2. *See Colyer*, 2015 WL 7566809, at *13 (“more
 20 importantly, the facts in this case simply do not corroborate Plaintiffs’ narrative”).

21 Nor do plaintiffs address the context surrounding Tesla’s statement, in which it warned:
 22 “what we have ahead of us, of course, is an incredibly difficult production ramp”; Tesla was
 23 headed into “manufacturing ...and supply chain hell”; it is “fundamentally impossible” and
 24 “crazy hard” to predict when production will ramp; and Tesla will undoubtedly face “a series of
 25 constraints” and “sometimes production will go backwards” due to equipment failures and other

26 _____
 27 ² Tesla repeatedly warned that it would only be able to move as fast as the slowest and least lucky
 28 component among the 10,000 parts in Model 3. *See* Mot. at 1, 9-10, 17. And it disclosed that it
 had “engaged a significant number of new suppliers [that] will have to ramp to achieve our needs
 in a short period of time,” and there was no assurance they would do so. *E.g.*, Ex. 15 at 42; Ex. 19
 at 43. Plaintiffs ignore these disclosures too.

1 problems. *Id.* Just days earlier at the Model 3 launch event, Mr. Musk also stressed that Tesla was
 2 entering “production hell” for at least the next “six to nine months.” *Id.* And, to underscore the
 3 point, he displayed a manufacturing S-curve graphic showing an exceedingly modest Model 3
 4 production anticipated in the short run, only ramping up in October (completely in line with the
 5 notion that more automation would be brought online around that time). Ex. 16 at 2. In other
 6 words, the assertion that full automation was not in place until October is *perfectly consistent*
 7 with Tesla’s actual disclosures. Plaintiffs’ *total silence* on these contemporaneous disclosures is
 8 telling and irreconcilable with their claim.

9 There is clearly nothing nefarious about Tesla utilizing semi-automated and manual
 10 processes at the outset of production (all manufacturers do), yet plaintiffs pejoratively
 11 characterize it as “banging out cars by hand” on “beta” or pilot lines (terms they never define and
 12 which are distinctly different from each other). Production is not an all-or-nothing proposition.
 13 Simply because Tesla was planning to use a high degree of automation to meet its year-end goal
 14 of 5,000 per week does not mean that it would not start to build Model 3s sooner.

15 Ignoring this, plaintiffs resort to arguing that a single answer to an analyst’s question on
 16 August 2 concerning anticipated gross margins (not production readiness) somehow suggested
 17 that all automated manufacturing processes were already complete.³ But it is obvious that Mr.
 18 Musk was not talking about how many cars Tesla was producing (much less that Model 3
 19 manufacturing in two factories in two states was one “gigantic machine” making cars). The
 20 August 2 letter stated that Tesla projected 1,500 cars for the entire 13-week third quarter, not that
 21 it was already producing a few hundred each week. Mr. Musk was merely illustrating the
 22 economic point that Model 3 gross margins would be negative because, until production
 23 increases, “you’ve got a gigantic machine . . . that’s meant for 5,000 vehicles a week and it’s
 24 producing a few hundred vehicles a week,” noting that “[t]his is true of anything. If . . . you had
 25 . . . a soap factory, let me tell you, your first bar of soap would be like millions of dollars. But
 26 then you get into volume production and then it’s like \$2 . . . [s]o true for any manufacturing
 27 situation.” Ex. 18 at 13-14. Put another way, Tesla was spending vast sums on Model 3, and

28 ³ Plaintiffs’ assertion that defendants “concede the material falsity” of Mr. Musk’s statement
 (Opp. at 5) is specious. Defendants actually said plaintiffs’ allegations “fall flat.” Mot. at 19 n.14.

1 margins would not be positive until volume production was achieved. No reasonable investor
 2 could have interpreted Mr. Musk's response as plaintiffs do. *See, e.g., Intuitive Surgical*, 759 F.3d
 3 at 1060.

4 **III. THE OPPOSITION FAILS TO IDENTIFY PARTICULARIZED FACTS NEEDED** 5 **TO SUPPORT A STRONG INFERENCE OF SCIENTER**

6 **A. Plaintiffs' Theory Makes No Sense, Is Contrary To Ninth Circuit Law, And** 7 **Ignores The Facts Showing Good Faith Belief In Tesla's Model 3 Plans**

8 To show scienter, plaintiffs were required to plead facts that are "persuasive," "effective"
 9 and "powerful." *Tellabs*, 551 U.S. at 323. "The bar set by *Tellabs* is not easy to satisfy." *Webb*,
 10 884 F.3d at 855. Viewed holistically, the inference of fraud must be cogent and compelling, and
 11 at least as strong as any opposing inference. *Tellabs*, 551 U.S. at 314, 326; *Webb*, 884 F.3d at
 12 850. Plaintiffs do not come close to meeting that exacting standard.

13 To the contrary, plaintiffs devote most of their scienter argument to repeating the same
 14 false narrative: that Tesla supposedly "knew" its preparations were not "on track" to achieve its
 15 year-end goal because fully automated lines were not in place on May 3 and August 2, 2017. *See*
 16 *Opp.* at 14-20. But as demonstrated above, Tesla said the opposite about automation, so such
 17 arguments cannot possibly show scienter (much less falsity). Critically, plaintiffs do not even try
 18 to argue that issues with the Gigafactory's module line, which proved to be the actual constraint
 19 on production, had even occurred on May 3 or August 2, much less that they were known to be
 20 constraints by Mr. Musk or Mr. Ahuja as of those dates. *See Rigel*, 697 F.3d at 881-82. That's
 21 because the problem did not arise (as plaintiffs' own FE confirms – AC ¶ 192) until September
 22 2017, **long after** the challenged statements. That alone is dispositive.

23 Plaintiffs' other arguments are beside the point and equally unavailing. It is not enough to
 24 allege that there were various problems or challenges associated with the Model 3 manufacturing
 25 ramp (particularly when they did not prove to be the actual constraint on production). As the
 26 Ninth Circuit has emphasized, "[m]uch of any business consists of having problems and dealing
 27 with them . . . That they exist does not make a lie out of any of the alleged false statements."
 28 *Ronconi*, 253 F.3d at 430, 435; *see Rigel*, 697 F.3d at 883-84 (knowledge of problems does not
 show defendants believed they were making false and misleading statements); *see Juniper*, 880 F.

1 Supp. 2d at 1064; *Allison*, 999 F. Supp. at 1348. That is especially true here, where Tesla warned
2 the market repeatedly of the many challenges it would face in stark terms.

3 Far from downplaying risks, Tesla said it was entering “production hell over the next six
4 to nine months,” that it faced “an incredibly difficult production ramp,” that with “ten thousand
5 unique items” in Model 3, “the production will move as fast as the slowest and least luck[y]
6 component in the whole mix,” that the outset of production will be “complicated and bumpy and
7 dealing with a lot of unexpected issues” and thus “very uncertain,” that the production rate is
8 “fundamentally impossible to predict,” that it would be utilizing “cutting edge” manufacturing
9 technology that will be “really hard to scale up,” and that Tesla had “no experience” attempting to
10 ramp this sort of manufacturing. Mot. at 1-4, 9-10. And these were not in boilerplate; they were
11 front and center in what Tesla said. No one deliberately trying to mislead would ever make such
12 repeated and consistent statements.

13 Under established law, such disclosures are meaningful and weigh heavily against
14 scienter. *See Rigel*, 697 F.3d at 884-85 (disclosure of adverse events inconsistent with scienter);
15 *Worlds of Wonder*, 35 F.3d at 1425 (detailed risk disclosure negates scienter); *Wet Seal*, 518 F.
16 Supp. 2d at 1152, 1164-65 (dismissing claim given cautionary disclosures). Rather than trying to
17 address them, plaintiffs parrot a superficial refrain about “generalized risk disclosures” not being
18 effective (Opp. at 21) where the “hypothetical” risk had supposedly “materialized.” But plaintiffs
19 cite no case in which such blunt warnings have ever been deemed “hypothetical” or “generic.”
20 And their own FE concedes that the actual constraint **had not** materialized until September, well
21 after the statements. Lacking any authority or facts, plaintiffs resort to the unprecedented
22 argument that some of Tesla’s warnings were mere pessimistic “puffery” (*id.* at 8), a concept not
23 recognized in any case and wholly at odds with the basic premise of securities fraud.

24 The lack of any financial motive further weighs against scienter. No defendant sold Tesla
25 stock during the alleged class period – even though Mr. Musk is Tesla’s largest stockholder (and
26 experienced the same price decline) – or obtained any other benefit whatsoever. *See Webb*, 884
27 F.3d at 856 (“we have recognized that a lack of stock sales can detract from a scienter finding”);
28 *Rigel*, 697 F.3d at 884-85 (absence of stock sales weighs against scienter); *Metzler*, 540 F.3d at

1067 (same); *In re FVC.com Sec. Litig.*, 136 F. Supp. 2d 1031, 1039 (N.D. Cal. 2000) (Breyer, J.) (no stock sales by CEO “negates any slight inference of scienter”), *aff’d*, 32 F. App’x 338 (9th Cir. 2002). And, as noted in the motion, Mr. Musk’s compensation package, which fully aligns his interests with the long-term success of Model 3, is similarly consistent with good faith. Mot. at 20-21. Lacking any response, the Opposition now ***affirmatively disclaims*** any “financial motive” to commit fraud in an overt effort to ward off these powerful facts. Opp. at 24 n.27.⁴

Instead, plaintiffs just make up a motive, speculating that defendants “were incentivized to buy as much time as possible to avoid a cash crunch while their attempts to mass produce [Model 3] floundered.” Opp. at 23. That makes no sense (and no witness even purports to support it). A “cash crunch” – whatever that means – is not averted by “falsely” saying in May or August 2017 that preparations were on track to hit a year-end goal, while supposedly knowing with certainty that investors would be disappointed just two months later (on October 2). Plaintiffs do not even attempt to explain how intentionally creating false expectations for this short period of time alleviates (rather than exacerbates) a cash crunch. To the contrary, a “cash crunch” would be alleviated by producing Model 3s and generating revenues as soon as possible. The desire to earn revenues and believing one can do so is shared by every business and does not support scienter. *See, e.g., Lipton v. Pathogenesis Corp.*, 284 F.3d 1027, 1038 (9th Cir. 2002) (“If scienter could be pleaded merely by alleging that officers and directors possess motive and opportunity to enhance a company’s business prospects, virtually every company . . . that experiences a downturn in stock price could be forced to defend securities actions”); *Webb*, 884 F.3d at 856 (desire to maximize profitability insufficient for scienter).⁵

Finally, plaintiffs’ theory fails under the inherently comparative, holistic analysis demanded to evaluate scienter. Tesla’s belief in the Model 3 program is reflected in everything it

⁴ Plaintiffs’ cases stand for the unremarkable proposition that the absence of stock sales is not in and of itself dispositive. *See, e.g., No. 84 Employer-Teamster Joint Council Pen. Tr. Fund v. Am. W. Holding Corp.*, 320 F.3d 920, 944 (9th Cir. 2003). Defendants do not argue otherwise. However, under Ninth Circuit law, the absence of sales does weigh against scienter. Mot. at 20.

⁵ Plaintiffs also offer a *non sequitur*, asserting that Tesla had a motive in light of its “well-documented history of overpromising production goals for earlier vehicles.” Opp. at 23. But rather than suggest fraud, those experiences underscore the many challenges Tesla faces when introducing newly-designed cars, and utilizing new manufacturing processes and supply chains. Mot. at 7. Even traditional automakers, building legacy vehicles with existing processes, experience production problems. *Id.* Plaintiffs ignore both points.

has done: the \$4 billion it invested, the buildout of the Gigafactory, and the equipment and processes it commissioned to support high volume production (a goal it has now *met*). *See Apple*, 886 F.2d at 1117. The only reasonable inference is that, as of May 3 and August 2, 2017, Tesla believed it could reach its goals, disclosed that there were serious challenges it would face, and then experienced unexpected difficulties in September as production progressed during Q3 2017. *See Mot.* at 4, 20-22. Those are the realities of complex manufacturing. *See Haque v. Tesla Motors, Inc.*, 2017 WL 448594, at *10-11 (Del. Ch. Feb. 2, 2017) (plaintiffs’ position “reflects a basic misunderstanding of Tesla’s complex manufacturing,” and “[s]imply because Tesla did not foresee production challenges it might face later in the quarter does not support an inference that its statement halfway through the quarter ... was false when made”).

B. Repeating Deficient Former Employee Allegations Does Not Support A Cogent And Compelling Inference Of Scienter

While plaintiffs rely on FEs for their scienter argument, they never try to address the most fundamental problem identified in Tesla’s motion: *not one FE* claims to know the planned schedule for Model 3 production as of May 3 or August 2, 2017, nor when automated lines were to be fully implemented, nor how the planned implementation compared to Tesla’s actual progress. *Mot.* 4-5, 22-24. Without knowing what the “track” actually was, no FE could possibly know whether Tesla’s preparations were “off track,” much less know that Mr. Musk or Mr. Ahuja deliberately sought to mislead anyone about the state of Tesla’s preparations for production at any time. The FE statements fail because they “must themselves be indicative of scienter,” and show that the *actual statements* were deliberately false. *See Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 995 (9th Cir. 2009). The FEs also fail for four further, independent reasons:

First, five FEs (FEs 1, 2, 4, 6, 7) left Tesla before Model 3 production even began – in some cases by more than a year – and thus lack any insight into Tesla’s ability to meet its goals by the end of 2017. *See Shurkin v. Gold State Vintners, Inc.*, 471 F. Supp. 2d 998, 1015 (N.D. Cal. 2006) (witness whose employment ended before class period lacks personal knowledge of subsequent activity), *aff’d*, 303 F. App’x 431 (9th Cir. 2008); *In re Silicon Image, Inc. Sec. Litig.*, 2007 WL 2778414, at *2 (N.D. Cal. Sep. 21, 2007) (witnesses lack personal knowledge because

they were no longer at company at relevant time), *aff'd*, 325 F. App'x 560 (9th Cir. 2009). While plaintiffs say that, in some instances, stale witness allegations can “shed light” on statements that post-date their employment (Opp. at 18), they fail to show why these allegations, which do not address Tesla’s statements (or disclosed risks) or the planned production schedule or the actual constraint on production, should be given any weight here.⁶

Second, the only FEs who purport to have any involvement with battery module production (FEs 8 and 9) *corroborate* what Tesla said: that in September 2017, well *after* the challenged statements, the automated module line at the Gigafactory suffered “malfunctions” and experienced faulty software, and this had an adverse impact on production, as any bottleneck would. Mot. at 23; AC ¶¶ 182, 186, 192-93. The Opposition avoids this devastating fact.⁷

Third, apparently to deflect attention, plaintiffs devote a section of their brief to FE statements relating to Fremont (downstream from the bottleneck). Opp. at 11-12, 16 (concerning FEs 1-7). But nothing at Fremont was the actual constraint on production at the time, and no FE contends otherwise. Mot. at 22-23. And while plaintiffs appear to include these allegations to assert that fully automated lines were not installed at Fremont on May 3 or August 2, 2017, this is just a retread of plaintiffs’ false “fully automated” narrative. In fact, several FEs, both at Fremont and the Gigafactory, do not even purport to address Model 3 production vehicles, which Tesla

⁶ In *In re Quality Sys. Inc. Sec. Litig.*, 865 F.3d 1130, 1145 (9th Cir. 2017), the court credited a statement by a very senior executive, the former COO, about management’s real time access to Salesforce reports – a fact that did not change with the passage of time and that was corroborated by other witnesses in the class period. That decision has no bearing on the circumstances here, where Tesla obviously continued to develop Model 3 plans and progress with implementation long after the former employees left.

⁷ Plaintiffs intentionally confuse the issues by trying to compare a few FE allegations about battery modules and packs to Mr. Musk’s August 2 comment that Tesla was “making great progress on the battery front.” Opp. at 16-17. But Mr. Musk’s statement was *not even about Model 3*. As the context (Ex. 18 at 4-5) and August 2 letter (Ex. 17 at 3) both make clear, the statement concerned the large scale battery storage products Tesla was producing for Australia to avoid blackouts. *See also* P. Williams & D. Hull, *Musk Heads To Australia To Unveil Progress On Giant Battery, Mars Mission*, Bloomberg, Sept. 28, 2017. And even if the statement had been about Model 3, plaintiffs’ assertions would fail, as there is a fundamental difference between a battery (Mr. Musk’s statement), and a module or pack (the FEs). And this even disregards overt reliability issues. For example, plaintiffs claim “there was a high failure rate for Model 3 battery modules for the entire time FE8 worked at the Gigafactory, from January 2014 through September 2017.” Opp. at 16. But the Model 3 was not even unveiled until 2016 (Ex. 1 at 1) and the Gigafactory had not even been built in January 2014 (Ex. 3 at 25, Ex. 15 at 32, stating that “we broke ground” in June 2014), so such allegations cannot possibly be credited.

1 started to build in July 2017, but instead discuss **test vehicles** that were being built earlier. *See* AC
 2 ¶¶ 153-57 (FE4), 170-71 (FE6), 155, 158 (FE7), 188 (FE9); *see also* Ex. 10 at 2 (began building
 3 prototypes in February). Hence statements by these FEs have no bearing on falsity or scienter.
 4 *See Tesla*, 75 F. Supp. 3d at 1043 (rejecting witness accounts relating to battery prototype).

5 *Fourth*, it is not enough to point generally to FE accounts of meetings attended by one or
 6 more defendants (Opp. at 14-15) or to claim that problems were “widely known” (*id.* at 19-20).
 7 *See Zucco*, 552 F.3d at 998 (rejecting “had to have known” allegation); *In re Fusion-io Sec. Litig.*,
 8 2015 WL 661869, at *19 (N.D. Cal. Feb. 12, 2015) (rejecting “everyone knew” allegation). Such
 9 generalities are a far cry from the contemporaneous, specific facts needed to plead scienter.⁸

10 Apparently recognizing this, plaintiffs return to FE1, the alleged “plastics” employee fired
 11 in **June 2016**, who claims to have expressed an opinion to Mr. Musk that Tesla would not be able
 12 to hit its 5,000 per week goal by the end of 2017. *See* AC ¶¶ 123, 125. Tellingly, nothing is
 13 pleaded even remotely suggesting that Mr. Musk agreed with FE1. Moreover, FE1’s opinion
 14 rested on a false premise, which plaintiffs put in bold italics in the AC, that production would not
 15 even “**start**” until January 2018. Mot. at 6, 23; AC ¶ 128. In fact, production started in July 2017,
 16 just as Tesla said it would. The Opposition’s attempt to explain away this fatal flaw – by claiming
 17 that FE1 really meant that “mass” production would not begin until 2018 – simply rewrites their
 18 own crystal clear allegation. Furthermore, it is obvious that uniform like-mindedness does not
 19 exist in a 37,000 employee company, and the outdated – and demonstrably incorrect – opinion of
 20 a single dismissed employee **over a year** before production began and **18 months** before the 5,000
 21 per week target only shows plaintiffs’ desperation, not scienter. *See Brodsky v. Yahoo! Inc.*, 592
 22 F. Supp. 2d 1192, 1201 (N.D. Cal. 2008) (rejecting witness account where substantial “temporal
 23 mismatch” existed with alleged misstatement); *In re Downey Sec. Litig.*, 2009 WL 2767670, at
 24 *11 (C.D. Cal. Aug. 21, 2009) (“second-guessing of management” insufficient to plead scienter).⁹

25 _____
 26 ⁸ Plaintiffs’ cases are inapposite. *See In re Amgen Inc. Sec. Litig.*, 2014 WL 12585809, at *17
 27 (C.D. Cal. Aug. 4, 2014) (“close topical and temporal proximity” of meeting where defendant
 28 was put on notice of a hard fact (an adverse study), not just an opinion, right before alleged
 misstatement); *Hatamian v. Advanced Micro Devices, Inc.*, 87 F. Supp. 3d 1149, 1162-63 (N.D.
 Cal. 2015) (witness accounts providing details of weekly and daily meetings, during which
 specific production problems were discussed, just prior to allegedly false statements).

⁹ For the same reasons, the statement of FE2, who was also gone by June 2016, that a few

C. Plaintiffs’ Baseless “Admission” Argument Cannot Establish Scienter

Plaintiffs persist in arguing that Tesla admitted, in February 2018, that it knew in May and August 2017 that it could not manufacture sufficient battery modules to ramp to 5,000 units per week by the end of 2017. This statement says nothing of the sort. *See* Mot. at 19. Tesla merely discussed the actions it was *then taking* to remediate the module line issues that started in September, now utilizing its German subsidiary in place of the outside robotics firm. *See* Ex. 24; AC ¶ 207. In fact, Tesla’s November 1 disclosures – which plaintiffs do not assail – stated that the problem with that outside vendor did not arise “until quite recently” as Tesla attempted to ramp production in Q3 2017. Mot. at 11; Exs. 21, 22. *See In re Yahoo! Inc. Sec. Litig.*, 2012 WL 3282819, at *13 (N.D. Cal. Aug. 10, 2012) (“simply disclosing something at some point does not ‘admit’ that it should have been disclosed earlier”), *aff’d*, 611 F. App’x 387 (9th Cir. 2015); *see Berger v. Ludwick*, 2000 WL 1262646, at *8 (N.D. Cal. Aug. 17, 2000) (calling later statement an “admission” is pure hindsight), *aff’d*, 15 F. App’x 528 (9th Cir. 2001).¹⁰

D. Plaintiffs’ Unpleaded Core Operations Theory Cannot Salvage Their Claim

The Opposition’s attempt to justify application of the core operations theory fails. That unpleaded theory, of course, “require[s] management to have, at a minimum, made false or misleading statements” (*Colyer*, 2015 WL 7566809, at *13) and plaintiffs have not cleared that fundamental hurdle. That alone disposes of this argument.

In addition, the core operations inference is permitted only in an “exceedingly rare category of cases.” *S. Ferry LP, # 2 v. Killinger*, 542 F.3d 776, 785 n.3 (9th Cir. 2008). It is not sufficient to allege that Model 3 was “important” or even “existential” or to claim that Mr. Musk “visited” Tesla’s factories. *See In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1064 (9th Cir. 2014) (rejecting presumption of knowledge of financial impact of chip defect affecting “flagship product” and problems with “two largest customers”); *Colyer*, 2015 WL 7566809, at *12

potential suppliers out of thousands doubted their ability to meet Tesla’s timelines says nothing about how actual suppliers subsequently addressed the start of production over the next year.

¹⁰ Plaintiffs cite *Constr. Workers Pension Tr. Fund – Lake Cty. v. Genoptix, Inc.*, 2013 WL 12123841 (S.D. Cal. Mar. 22, 2013), but that case only underscores the deficiencies here. There, defendants later acknowledged a trend of declining demand over the prior twelve months, directly conflicting with earlier statements about strong demand in the same period. *Id.* at *6. Combined with first-hand witness accounts that defendants knew demand was declining, the court founds scienter sufficiently pled. *Id.* at *7. Such allegations are wholly absent here.

(insufficient to claim that key product was at issue). Instead, plaintiffs need to allege facts showing that *falsity* would have been “patently obvious” or “detailed involvement in the minutia of a company’s operations” demonstrating each defendant’s knowledge of falsity. *See Zucco*, 552 F.3d at 1001; *Intuitive Surgical*, 759 F.3d at 1062. Plaintiffs do neither.

They offer no details concerning the production plan as it stood on May 3 or August 2, 2017, much less contemporaneous facts that would have made it “patently obvious” that Tesla would be unable to hit – *by year-end* – its goal as it continued to install, implement and ramp production lines over the ensuing months. Nor do they allege facts showing that Mr. Musk (or Mr. Ahuja, who plaintiffs barely mention) was involved in the “minutia” of the module line until it became an actual constraint on production long after the statements plaintiffs assail in Q3 2017. This is not “core operations,” but fraud by hindsight.¹¹

IV. THE OPPOSITION CANNOT CURE THE ABSENCE OF LOSS CAUSATION

Plaintiffs abandon any pretense that Tesla’s October 2 disclosure of Model 3 production bottlenecks (and the missed production guidance for Q3) caused any loss since Tesla’s stock price actually *increased* after that disclosure.¹² Loss causation requires a price decrease following revelation of the alleged “fraud.” *Metzler*, 540 F.3d at 1063.

Plaintiffs’ reliance on the October 6 *WSJ* story is misplaced. This was not a “corrective” disclosure by Tesla. It was a hearsay article speculating that the absence of complete automation (such as welding parts by hand) was behind the bottleneck. But again, Tesla *never said* that all automated systems were in place, but said the opposite. Thus, the *WSJ* did not “correct” an allegedly “fraudulent statement” made months earlier in May or August. *See Intrexon*, 2017 WL 732952, at *7. In addition, plaintiffs cannot establish that a temporary, single day stock decline is sufficient to show loss causation. *See Metzler*, 540 F.3d at 1065 (no loss causation where, just three days later, “stock quickly recovered from the 10% drop” following a *Financial Times*

¹¹ Plaintiffs’ contention that Sarbanes-Oxley certifications raise a strong inference of scienter is contrary to law. *See, e.g., Brodsky*, 592 F. Supp. 2d at 1205.

¹² To the extent the Opposition puts misplaced reliance on Mr. Musk’s August 2 illustrative point about a “gigantic machine” producing a few hundred cars per week, this price reaction further defeats plaintiffs’ claim. On October 2, Tesla disclosed that it had produced only 260 vehicles in all of Q3, and its stock price *rose*. That shows that reasonable investors did not construe Mr. Musk’s comment as plaintiffs attempt to do, and there is no loss causation in any event.

1 story); *Loos v. Immersion Corp.*, 762 F.3d 880, 889 (9th Cir. 2014) (citing *Metzler*). Any other
 2 result would allow a plaintiff to establish loss causation any time a reporter writes a negative
 3 article, regardless of whether it is “corrective,” so long as a temporary price decline follows.¹³
 4 That is just what *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 343 (2005) was intended to
 5 prevent. *See also Qualcomm*, 2017 WL 3226701, at *15, 19 (agreeing that “false deducements
 6 made by Plaintiffs and/or journalists” do not support a claim).

7 Finally, loss causation cannot be based on Tesla’s November 1, 2017 disclosure of revised
 8 forward-looking guidance, because plaintiffs have made no claim based on Tesla’s forecast. *See*
 9 Mot. at 25. Instead, plaintiffs argue that a posting on a website (called Jalopnik) at noon EST on
 10 November 2 revealed “new” information unrelated to the guidance change “causing a price
 11 decline.” Opp. at 25; *see* AC ¶ 246. But this fails for two reasons. First, “new” information is not
 12 the test; the test is whether the Jalopnik posting revealed a prior misstatement in May or August.
 13 Because Tesla never said that all automation was in place back then, the Jalopnik posting does not
 14 comport with *Dura*. Second, that defect aside, plaintiffs fail to identify facts showing that Tesla’s
 15 stock price declined *in response* to the mid-day posting, as opposed to earlier in the day in
 16 response to the guidance change. That omission is fatal to their claim. *See Apollo Grp.*, 774 F.3d
 17 at 605 (loss causation must be pled with specificity).¹⁴ Furthermore, plaintiffs (who filed suit on
 18 October 10) had always stated that the class period ended on October 6 – through the entire lead
 19 plaintiff process, including the PSLRA public notice and lead plaintiff motion filed well after the
 20 November 1 disclosure. They cannot abandon that position merely to seize on a later stock price
 21 decline untethered to any alleged misstatement.

22
 23
 24 ¹³ Proving the point that false reports can affect Tesla’s stock irrespective of any corrective
 25 disclosure, short sellers and the press recently re-broadcast the Opposition’s inaccurate assertion
 26 that “Defendants concede the material falsity of Defendant Musk’s August 2, 2017 statement”
 (Opp. at 5), resulting in a completely unwarranted 2.75% drop in Tesla’s stock price on July 24.
See, e.g., B. Alpert, Tesla Calls Lawsuit’s Claims A Complete Lie, Barron’s, July 24, 2018.

27 ¹⁴ Plaintiffs try to conceal this deficiency with a vague allegation that the stock declined due to
 28 both announcements combined. AC ¶ 247. But the announcements were made at distinctly
 different times. If plaintiffs now wish to rely on Jalopnik, they were required to plead a decline in
 response to it as opposed to a decline *earlier* in the day. They cannot do so in good faith in light
 of intraday trading information, which is why their pleading is entirely vague on this issue.

V. LEAVE TO AMEND SHOULD BE DENIED

Leave to amend is not automatic. While liberal, amendment must be in the interests of justice, and it is denied where it is futile or unfairly prejudicial. Plaintiffs' allegations are irreconcilable with Tesla's disclosures about Model 3 production. They rest on a fraud theory that makes no sense, benefitted no one, and is contrary to overwhelming facts defeating scienter. Repleading cannot cure these deficiencies, and it is telling that plaintiffs identify no further facts they could allege. *See Greenberg*, 233 F. Supp. 3d at 775.

Plaintiffs rely on post-class period events and publicly available information (AC at 2, ¶¶ 249-54), but such events illustrate why leave to amend is futile. Tesla has reached its Model 3 production milestone of 5,000 units a week. *See, e.g., F. Lambert, Tesla Reaches Model 3 Production Milestone and Record 7,000-Car Week Total Production, Says Elon Musk*, Electrek, July 1, 2018. Model 3 is the best-selling electric vehicle in the United States and the best-selling mid-sized premium sedan of all kinds, outselling the Mercedes C class, BMW 3 Series, Audi A4 and Lexus IS combined. *See, e.g., Tesla Second Quarter 2018 Update* (filed Aug. 1, 2018 with SEC on Form 8-K). So all that plaintiffs are left with is a temporary setback at the very outset of a particularly complicated production ramp – one that Tesla warned it could face. That is not, and never has been, the basis for a securities fraud suit.

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Respectfully submitted,

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